

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2110

To Be Argued By
GERALD RYAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. MARTHA CARMONA, DONNA
FOGGIE, and all other persons similarly
situated,

Petitioner-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York
State Department of Correctional Services;
FRANCES CLEMENT, Superintendent, Bedford
Hills Correctional Facility, Bedford Hills,
New York, and all other persons similarly
situated; FRANK CALDWELL, Acting Chairman
of the New York State Board of Parole; and
the NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK

BRIEF FOR RESPONDENTS-APPELLANTS

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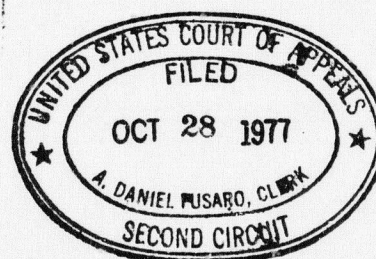


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APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR RESPONDENTS-APPELLANTS

Preliminary Statement

This is an appeal from an order of the United States
District Court for the Southern District of New York (Motley, J.)
entered August 17, 1977 granting the habeas corpus application
of Martha Carmona and Roberta Fowler.

Question Presented

Whether the sentences prescribed by New York State in mandating life imprisonment for certain "drug law" offenses are so disproportionate as would constitute cruel and inhuman punishment in violation of the United States Constitution as applied to petitioners-appellees Carmona and Fowler.

Background of the Case

Martha Carmona - On July 30, 1974, pursuant to the search warrant, the officers of the New York City Police Department, Bronx Narcotics Unit searched the apartment of the appellee and found approximately 3 and 3/8 ounces of cocaine, a small quantity of marijuana, and other articles utilized by the appellee in the narcotics business.

On August 13, 1974, the Grand Jury of Bronx County indicted the appellee for the articles found in her home on July 30, 1974. The first count of the indictment alleges Criminal Possession of a Controlled Substance in the First Degree which is a class A-felony. At the time of Carmona's actual arrest, she made a full confession to Assistant District Attorney Edward Rothman.

Subsequently, Carmona was arrested and charged under indictment number 1519/74 for the crime of Criminal Sale of a Controlled Substance in the First Degree in that on May 30, 1974, while acting in concert with three others, she sold approximately 3 and 7/8 ounces of heroin to an undercover officer for \$5,000 in United States currency.

The petitioner-appellee was also arrested and charged under indictment number 1979/74 for the crime of Criminal Sale of a Controlled Substance in the First Degree in that it is alleged that on June 24, 1974 Carmona, acting alone, did sell approximately four ounces of heroin to an undercover officer for \$7,500 in United States currency.

On several occasions, Carmona indicated to members of the District Attorney's Office and to officers assigned to the Bronx Narcotics unit, New York City Police Department that she wanted to cooperate with law enforcement agents so that she could be eligible for life-time probation pursuant to Section 65(b) of the Penal Law. However, when asked to introduce an undercover officer to her supplier of narcotics or to identify individuals with whom she had conversed on the telephone, she stated that she could not do that. All of the information that she provided to the law enforcement officials was information that they already had and therefore, she provided no material assistance.

The District Attorney's investigation has shown that the appellee lived in a rather lavishly furnished apartment and that she was able to maintain a relatively-high living standard without any visible, legal means of support. Carmona after consulting with privately retained counsel entered a plea of guilty to the crime of Criminal Possession of a Controlled Substance in the Second Degree a class A-II felony to cover the three indictments.

On January 31, 1975, her plea was accepted by Justice Cohen of the Supreme Court, Bronx County and, on March 10, 1975, she was sentenced to the term of six years to life imprisonment. Her appeal was denied by the Appellate Division, First Department in late 1976, and leave to appeal to the New York Court of Appeals was denied. She is presently incarcerated in the Bedford Hills Correctional Facility of which respondent Frances Clement is Superintendent. Carmona herself was not addicted to the use of drugs (emphasis supplied).

Roberta Fowler - Petitioner-Appellee is presently serving a sentence of four years to life imprisonment in Bedford Hills Correctional Facility for the crime of criminal sale of a controlled substance in the third degree, to wit, approximately one individual dose of a substance containing cocaine.

The offense for which Ms. Fowler is incarcerated occurred on September 25, 1973. At trial, the People established that, on that date, one James Werthmuller, an undercover agent, observed the appellee at an Albany police station, asked her whether she could get him twenty dollars worth of cocaine, and then gave her twenty dollars. Ms. Fowler then left in a car with one Jerome Powell, a Government informer. Some twenty minutes later, the three individuals met again by pre-arrangement at a different location, at which point appellee handed the substance containing cocaine to Powell, who, in turn, handed it to Werthmuller.

After a jury trial in February, 1974, Ms. Fowler was sentenced, on February 21, 1974, to a term of four years to life, the court exercising its discretion to set a minimum term of from one year to eight years and four months.

During 1972, she had sought and obtained treatment at a methadone clinic in Albany, but, at the time of her arrest, she was not addicted to any narcotic drug (emphasis supplied). Her conviction was appealed through the State court system, and was affirmed by the New York Court of Appeals sub nom. People v. Broadie, 37 N Y 2d 100, 371 N.Y.S. 2d 471, cert. denied 423 U.S. 950 (1975).

Her previous involvement with drug associated crimes and other brushes with the penal law were as summarized in the decision of the District Court nt. 13

"On April 27, 1972, Ms. Fowler was arrested and charged with criminal possession of hypodermic instrument (Penal Law § 220.45) and criminal use of drug paraphernalia in the second degree (Penal Law § 220.50). She was adjudged guilty of both charges and sentenced to three years probation. On June 29, 1972, she was arrested and charged with prostitution (Penal Law § 230.00). She was found guilty on August 9, 1972, and was sentenced to one year's probation. On February 22, 1973 she was again arrested, charged with prostitution, and found guilty on July 30, 1973. On July 10, 1973, she was arrested and charged with obstructing government administration (Penal Law § 195.05), possession of a dangerous drug (Penal Law § 220.05) [now repealed], and possession of stolen property (Penal Law § 165.45). These charges were dismissed because she pleaded guilty to another charge on July 30, 1973.* On July 12, 1973, she was arrested and charged with petit larceny (Penal Law § 155.25), criminal possession of stolen property in the third degree (Penal Law § 165)."

Proceedings in the United States District Court:

The petitioners-appellees attacked the provisions of various state statutes which are referred to herein as the drug law.

* Petit Larceny - this case involved the theft of three checks.

Specifically they charge as unconstitutional

a) the mandatory indeterminate life sentences for all class A drug offenders;

b) the preclusion of plea bargaining for all A III felony offenders*;

c) the mandatory lifetime parole provision without possibility of discharge** (which has also been altered during the pendency of this appeal to permit class A drug felons to be discharged from parole on the same basis as all other parolees);***

* Effective July 1, 1976, Criminal Procedure Law § 220.10(5)b now permits an appellee accused of an A III felony or an attempt to commit such a felony to plead guilty to a lesser offense down to a class E felony. CPL Section 220.10(6) had previously prevented those accused of A III felonies from pleading to a reduced charge. It is to be noted that neither of these petitioners pled guilty to an A III felony.

** Correction Law § 212(6)(8).

*** The Governor's bill, § 6912, has been passed by both House of the New York Legislature. It was placed on the Governor's desk for his signature on August 2, 1977. The Governor signed this Bill into law on August 11, 1977.

d) the predication of probation,
in part, upon a recommendation from
the prosecutor due to the appellee's
cooperation;* and

e) the denial of bail pending
appeal.**

Moreover, they have charged that, both on their face
and also as enforced, these various provisions deny them their
rights to due process of law, to the equal protection of the law,
and to be free from cruel and unusual punishment.

At the time of the commencement of the application,
appellees Carmona and Fowler were both incarcerated.

The court did not find it either necessary or
appropriate to pass upon all these challenges to the legality
of appellees' custody. The Court felt that the challenges to
the lifetime parole provisions had been rendered moot by the new
legislation making these appellees eligible for discharge from
parole like any other parolees.

* Penal Law § 65.00(1)(b).

** Criminal Procedure Law § 530.50.

It had previously ruled that the challenge to the preclusion of bail pending appeal was apparently not before the New York Court of Appeals in the Broadie case, and since there apparently yet remained an avenue to challenge that statutory provision in the New York courts, in Ms. Foggie's case, the validity of that provision was not ripe for adjudication in the federal courts. United States ex rel. Carmona v. Ward, 416 F. Supp. 272 (S.D.N.Y., 1976).

Furthermore, the District Court found that the remaining provision concerning plea bargaining and probation either singly or in conjunction with the others, did not offend the constitution.*

What the court did find was that Carmona's and Fowler's sentences were so disproportionately severe in relation to the gravity of the offenses charged as to constitute cruel and inhuman punishment.**

* Courts opinion, p. 16.

** Courts opinion, pp. 3, 11, 16, 35, 37.

ARGUMENT

THE SENTENCES PRESCRIBED
BY THE NEW YORK STATE
LEGISLATURE FOR DRUG
CRIMES ARE IN ALL RESPECTS
CONSTITUTIONAL AND VALID.

Prescribing certain conduct as criminal and prescribing punishment for such conduct are fundamental and inherent powers of the State Legislature. E.g., Pennsylvania v. Ashe, 302 U.S. 51 (1937); Whipple v. Martinson, 256 U.S. 41; Weems v. United States, 217 U.S. 349, 379 (1910); United States ex rel. Daneff v. Henderson, 501 F. 2d 1180 (2d Cir., 1974).

"The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the State's] determination. Collins v. Johnston, 237 U.S. 502, 510; Howard v. Fleming, 191 U.S. 126, 135-136. It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes." Pennsylvania v. Ashe, supra at 55.

The same point was made by Justice Douglas, speaking for the Court in Skinner v. Oklahoma, 316 U.S. 535 (1942):

"Under our constitutional system, the states in determining the reach and scope of particular legislation need not provide 'abstract symmetry'. They

may make and set apart the classes and types of problems according to the needs and as dictated or suggested by experience... A state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment." (316 U.S. at 539-540) (dicta).

The Court had earlier noted:

"That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one." Howard v. Fleming, 191 U.S. 126, 135-136 (1903).

"The power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define the crime and ordain its punishment." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 93 (1820).

This power includes the broad power to regulate drug traffic within state borders.

"The broad power of a state to regulate the narcotic traffic within its borders is not here in issue. More than forty years ago in Whipple v. Martinson, 256 U.S. 41, this Court explicitly recognized the validity of that power. 'There can be no question

of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs ... The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question'. 256 U.S. at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A state might impose criminal sanction, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession within its borders.... In short, the range of valid choice which a state might make is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide." Robinson v. California, 370 U.S. 660, 664-665 (1962).

The court below correctly noted that the exercise of this legislative power to define crimes and to establish punishments therefore, is however subject to judicial scrutiny to ensure that it does not transgress any constitutional prohibitions. Furman v. Georgia, 408 U.S. 313; Trop v. Dulles, 356 U.S. 86.

However, that judicial power is not unrestrained. The United States Supreme Court emphasized this caution in Gregg v. Georgia, 428 U.S. 153 at 174-5 when it observed:

"But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures'. Dennis v. United States, 341 US 494, 525, 95 L Ed 1137, 71 S Ct 857 (1951) (Frankfurter, J., concurring in affirmance of judgment).*

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We

* See also Furman v. Georgia, supra, at 411, 33 L Ed 2d 346, 92 S Ct 2726 (Blackmun, J., dissenting):

"We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great."

may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people'. Furman v. Georgia, *supra*, at 383, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, *id.*, at 465-470, 33 L Ed 2d 346, 92 S Ct 2726 (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'. Gore v. United States, 357 US 386, 393, 2 L Ed 2d 1405, 78 S Ct 1280 (1958). Cf Robinson v. California, 370 US, at 664-665, 8 L Ed 2d 758, 82 S Ct 1417; Trop v. Dulles, 356 US, at 103, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion); In re Kemmler, 136 US, at 447, 34 L Ed 519, 10 S Ct 930. Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country'. Powell v. Texas, 392 US 514, 533 20 L Ed 2d 1254, 88 S Ct 2145 (1968). A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the

people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. See *Furman v. Georgia*, *supra*, at 461-462, 33 L Ed 2d 346, 92 S Ct 2726 (Powell, J., dissenting)."

A review of the cases that have wrestled with the problem of 8th Amendment limitations on power of state legislature bodies dictate that a number of considerations must be weighed in determining what punishment is considered cruel and unusual.

In *Furman* (*supra*) Justice Brennan set out four principles in his concurring opinion which he asserted must be applied to determine that: the punishment comport with the dignity of man; it must not arbitrarily inflict severe punishment; it must not be unacceptable to contemporary society and must not be excessive so as to amount to a pointless infliction of suffering (disproportional).

In determining whether these principles have been violated, other cases have outlined specific areas of inquiry which may be used as measuring standards. In *Hart v. Coiner*, 483 F. 2d 136 (4th Cir., 1973), cert. den. 415 US 983 (1974) and *In re Lynch*, 503 Pd 921 (Cal 1972) (both of which emphasized

the element of disproportionality) upon which the District court relied heavily in reaching its decision in the matter noted that the following must be considered: the nature of the offense; the legislative purpose behind the punishment; how the appellee would have been punished in other jurisdiction and the comparative punishment for other crimes in the same jurisdiction. In other cases reliance was placed on whether violence was involved. Hart (supra). Still others placed emphasis on the degree of danger which the offense and the offenders present to society. In re Lynch, 503 P 2d 921 (1972).

In Hart (supra) the appellee in a habeas corpus proceeding was sentenced to life imprisonment as a recidivist. The recidivist charge against Hart was based upon a perjury conviction and two prior convictions - one in 1949 for writing a check on insufficient funds for \$50, and one in 1955 for interstate transportation of forged checks worth \$140.

The perjury charge arose out of testimony given by Hart at the murder trial of his son which the court found was a product more of family loyalty rather than evil intent.

The court also found that none of Hart's offenses were against the person. None involved violence or danger of violence toward persons or property. The bad check case was very "nearly trivial" - one penny less in the face amount of the check and the offense would have been a five-to-sixty day petty misdemeanor and that the crimes involved were of those that ranked relatively low in the hierarchy of crimes.

In Re Lynch (supra) the court was dealing with a matter that involved a prescription of a life sentence for the second offense of indecent exposure. A single commission of the act was no more than a misdemeanor punishable by a brief jail sentence or a small fine. There was a total absence of violence, harm to society, and such punishment as it turned out was contrary to legislative purpose.

The latest case upon which the court below placed its reliance involved the imposition of the death penalty for the rape of an adult. Coker v. Georgia, 45 USLW 4961 (1977). In that opinion, the court found that such punishment was a disproportionate penalty. Although the court considered several factors in reaching its determination it buttressed its conclusion on two main elements: firstly, the death penalty is unique in its severity and irrevocability and secondly, that although rape is

a serious crime it did not involve the taking of a life
(emphasis supplied).

What must first be considered in the instant case is the motivation of the legislature in enacting the present statute and the societal problems confronting the state.

In his Annual Message to the Legislature on January 3, 1973, Governor Rockefeller observed: "The number one, growing concern of the American people is crime and drugs * * *". (McKinney's Session Laws of New York [1973] Vol. 2, pp. 2317-2322).

The Legislature shared this concern and conducted extensive hearings and investigations into the problem. Based on the facts as the Legislature found them to be, including a very high and very close statistical relationship between crime and drug abuse, a 60% to 65% recidivist rate for felons convicted of drug related crimes, an inadequate response to less severe punishment, and an insidiously growing problem extending from the ghetto to the suburbs and the brothel to the campus*, the Legislature determined that stricter penalties were appropriate.

* Official Transcripts, Joint Senate and Assembly Standing Committee on Codes, Jan., Feb., March 1973, O'Neill Reporting Company, White Plains, New York; Official Transcripts, Senate Debate on Drug Bills (S 6204, S 6205, A 7328, A 7873) April, May, 1973 Senate Stenographer, State Capital, Albany, New York; Official Transcripts, Assembly Debate on Drug Bills (S 6204, S 6205, A 7328, A 7873), May 1973, Assembly Stenographer, State Capital, Albany, New York; Penal Law, Art. 220, Supplementary Practice Commentary by Arnold Hechtman, McKinney's Consolidated Law of New York, 1974-1975 Supplement.

As the Appellate Division, Fourth Department, noted in People v. Mosely and People v. McNair,* 46 A D 2d 476 affd. sub nom People v. Broadie, 37 N Y 2d 100 (1975), cert. denied 423 U.S. 950 (1975):

"The drug problem, as it exists today in New York State, needs no citation of authority to establish its pervasive existence. Narcotics addiction, particularly heroin addiction, is undoubtedly one of the most serious social evils confronting American society today."

In proposing the Drug Law of 1973, Governor Rockefeller stated "The only way to deter this commerce is tragedy is by measures so strong, so effective, so fully enforced that the hard drug pusher will no longer risk his own life and freedom by jeopardizing the lives of others". (Annual Message of Governor, McKinney's Session Laws of New York [1973] Vol. 2, pp. 2317-2322).

His comments reflected the intolerably high drug traffic in the City and State of New York. In 1973, the Legislature passed the drug law, which included mandatory life sentences as punishment for those convicted of felonies.

"The 1973 revision of the drug law . . . mirrors many of society's current concerns and attitudes about the problems inherent in and created by drug abuse.

* Both Mosely and McNair brought a Federal Habeas Corpus petition in the Western District Court of New York on the same grounds as the instant case. The Court (Burke, J.) denied the petitions citing with approval People v. Broadie (supra). Mosely v. Smith Civ 75-416, McNair v. Clement Civ 75-422.

Frustration with the seeming intractability of the drug problem is reflected in the hard line approach (taken by the Legislature) to the classification of drug crimes and to tougher and more restrictive sentencing options upon conviction." (Supplementary Practice Commentary of Arnold Hechtman, Esq., McKinney's Constitutional Law of New York, Book 39, Penal Law, Art. 220, 1973-1974, supplement, p. 6).

In a unanimous decision, holding the sentences prescribed by the 1973 revision of the drug laws constitutionality valid the New York Court of Appeals noted:

"In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society. The Legislature, in making this assessment, could properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution, is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse (see, generally, President's Comm. on Law Enforcement and the Administration of Justice, Task Force on Narcotics and Drug Abuse [1967], p. 7).

Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes engage in crimes of violence among themselves.

(see, e.g., People v. Medina, 47 A D 2d 717 [two drug pushers upon learning of a dealer's plot to have one kill the other, kill the dealer]).

More significant, of course, are the crimes which drug traffickers engender in others. The seller often introduces the future addict to narcotics. The addict, to meet the seller's price, often turns to crime to 'feed' his habit. Narcotics addicts not only account for a sizable percentage of crimes against property; they commit a significant number of crimes of violence as well (see Task Force on Narcotics and Drug Abuse. op. cit., pp. 10-11; Second Report of the National Comm. on Marijuana and Drug Abuse, Drug Use in America; Problem in Perspective, p. 165; see, generally, Greenberg and Adler, Crime and Addiction; An Empirical Analysis of the Literature, 1920-1973, 3 Contemporary Drug Problems 221).

Thus the Legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime. And violent crime is not, of course, the only destroyer of men and the social fabric. Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers (see, generally, Interim Report of the Temporary State Comm. to Evaluate the Drug Laws, NY Legis Doc. 1972, No. 10, p. 58).

Measured thus by the harm it inflicts upon the addict, and through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank". People v. Brodie, 37 N Y 2d 100, 112-113 (1975), cert. denied 423 US 950 (1975).

Regarding the violence traced to drug abuse two New York courts quoted an observation made in an earlier case:

"More young people in our city [New York] die from drug abuse than from any other single cause." People v. Venable, 46 A D 2d 73 (3d Dept. 1974) affd.; People v. Broadie, supra; People v. Junco, 43 A D 2d 266, 268 affd. 35 N Y 2d 419, cert. den. 421 U.S. 951.*

The exceptionally serious nature of narcotics offenses has been realized by legislative bodies other than the New York State Legislature.

The dissenting opinion to Schick v. Reed, 419 U.S. 256, 275 n. 11 (1974) noted that life imprisonment without the opportunity for parole was unknown to military law and that

"The only federal law recognition of this punishment in a civilian context is found in the very limited no-parole provisions dealing with continuing narcotics enterprises.... Guided by the special nature of drug offenses and drug offenders the Congress enacted this narrow exception to universal eligibility for parole."

* Estimates of the total number of narcotics addicts in the United States vary greatly. In 1971 the National Institute of Mental Health, based on a wide range of data, estimated the addict population in the United States at between 250,000 and 315,000. It is generally conceded that well over half of this population is based in New York City (Licit and Illicit Drugs, by Breacher and the Editor of Consumer Reports-Little, Brown & Co., Boston, 1972, at 72). Latest estimates place the nationwide figure at 725,000 (Newsweek, Feb. 24, 1975, p. 24).

In upholding the validity of a federal statute which prohibited the suspension of sentence or probation in cases of violation of the Narcotics Drugs Import and Export Act together with the imposition on first offenders of a sentence of at least five years nor more than twenty years in addition to a fine of up to \$20,000 a federal court noted:

"In view of the moral degeneration inherent in all aspects of the crime denounced by the Narcotic Act, it cannot be said that the length or severity of the punishment here prescribed is disproportionate to the offense." Gallego v. United States, 276 F. 2d 914, 918 (9th Cir., 1960).

In arriving at this decision the court considered the concerns of Congress as indicated in the Congressional Record which prompted it to find that the elimination of parole for first offenders was necessary. Gallego v. United States, supra at 918, n. 4. Further, the United States Supreme Court has stated:

"We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government." Robinson v. California, supra at 667.

[T]here is a certain subordination of the judiciary to the Legislature, the function of the Legislature is primary, its exercises fortified by presumptions of rights and legality and is not to be interfered with lightly,

nor by any judicial conception of their wisdom or propriety." Weems v. United States, supra at 379.

It is only where it can be unhesitatingly said that the prescribed punishment is clearly and manifestly cruel and unusual that the penalty can be annulled by the court. e.g. Keiling v. Field, 431 F. 2d 502 (9th Cir., 1970); United States v. Sorcey, 151 F. 2d 899 (7th Cir., 1945) cert. denied 327 U.S. 794; Cooper v. United States, 403 F. 2d 71 (10th Cir., 1968).

It is within this context, of the broad power of a state legislature to determine the gravity of offenses and fix penalties for their commission, the serious nature of narcotics offenses well recognized by other jurisdictions, and the extensiveness of narcotic trafficking in New York in particular, that the constitutional validity of the 1973 revision of New York's drug laws must be considered. Neither the length of the prescribed sentence for Class A felonies nor the fact that the maximum term is mandatory, and that the minimum term of imprisonment must be set by the court offends

the Federal Constitution.* While in 1973 revision mandates a maximum term of life imprisonment, it leaves considerable discretion with the court to minimum term which can be as short as one year. Probation without imprisonment is also a possibility in an appropriate case. Penal Law § 65.00(1)(b).

* The New York Court of Appeals in People v. Broadie, supra at 115 briefly summarized the severity of these sentences in relation to sentences for other crimes in New York State. The history and origins of the cruel and unusual punishment clause were explored in an appendix to that opinion. It should be noted that under state law the minimum term of any indeterminate sentence must be at least one year - Penal Law, § 70.00(3).

It should further be noted that while for Class B, C, or D felonies, the court may impose a minimum sentence or leave it to be fixed by the State Parole Board, the advantages derived from a court set minimum term has been the subject of litigation. Walker v. Oswald, 449 F. 2d 48 (2d Cir., 1971) (Claim that prisoner was entitled to same due process rights and procedural safeguards at an MPI hearing before Parole Board as one would enjoy if sentenced by court; Rose v. Gross (74 Civ. 3348, S.D.N.Y.) (Challenge to Correction Law § 212.2 on the grounds that it permits the Parole Board to set a minimum term of greater duration than a court is authorized to impose and that the law did not require that the Board credit an inmate's jail time against the minimum while Penal Law § 70.30(3) requires that such time be credited against a minimum term when fixed by a court resulting in earlier parole eligibility for those where minimums are fixed by the Court).

Imprisonment, even if for mandatory lengthy terms, has historically been upheld by the United States Supreme Court as an entirely proper response to actions of demonstrable criminal magnitude. Schick v. Reed, supra (upholding a sentence of life imprisonment without opportunity for parole while noting that the no parole condition "is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution"); Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86, 101-102 (1956) ("fines, imprisonment and even execution may be imposed depending upon the enormity of the crime"). Indeed the tenor of recent cases is that it is the opportunity for abuse of judicial discretion which renders a sentence cruel and unusual. In Furman v. Georgia, supra, the court invalidated the imposition and execution of a discretionary death sentence. In a concurring opinion Justice Douglas wrote that the Eighth Amendment required state legislatures to enact laws which are even-handed and non-selective and stated:

"In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and

saving those who by social position
may be in a more protected position."
Supra at 255.

Mandatory sentencing provisions avoid even the
appearance of arbitrariness, avoid judicial abuse of discretion,
and insure the uniform application of the law to all offenders:

"The degree of disparity from
one judge to another is widely
regarded as a disgrace to the legal
custom." K. Davis, Discretionary
Justice (1971) at 133.

In his dissent in Hart (supra) Boreman, SCJ wrote at
p. 147:

"The sentence to be imposed is
mandatory. There is no room for it
to be 'applied and administered by
public authority with an evil eye
and an unequal hand,' nor opportunity
for 'unjust and illegal discriminations
between persons in similar circumstances'.
The statutory requirement that a life
sentence be imposed insures uniform
application and prevents any abuse of
discretion by the trial judge. The only
discretion involved is that of the
prosecutor in deciding whether to
proceed against a particular defendant
under the . . . statute . . ."

Davis' book goes on to quote from Senate Reports, No. 2013, 85th Cong.:

"The existence of wide disparities casts doubt upon the evenhandedness of justice and discourages a respect for the law."

The subject of indeterminate discretionary sentences was explored in an article by Professor Alan Dershowitz which appeared in the N.Y. Times (December 28, 1975) § 6 (Magazine) at 7. The article concludes that "a surprising consensus is emerging around the idea that it is time for a return to uniformity in sentencing", notes that the results of a recent study commissioned by the United States Court of Appeals for the Second Circuit found great disparities in sentencing among 50 federal judges who were given 20 identical files, and quotes Judge Frankel of this Court as saying that wide disparities in sentencing are commonly a function "of the wide spectrums of character, bias, neurosis and daily vagary encountered among occupants of the trial bench".

The mandatory sentencing provisions of the new Law escape the vast potential for abuse existing under former Penal Law provisions governing sentencing for drug sale and possession.*

* "Our Penal Law philosophy has consistently rejected the notion of unbridled sentencing discretion and, in spite of the difficulty involved in setting up a degree structure, we are committed to attempting to find a rational basis for defining levels of culpability". Interim Report of the Temporary State Commission to Evaluate the Drug Law, Legislative Document (1972) No. 10; p. 59.

Moreover, as quoted in Schick v. Reed, the imposition of a mandatory term and statutes prohibiting probation, parole and suspended sentences have long been found to be constitutionally valid. United States v. Ross, 464 F. 2d 376 (2d Cir., 1972), cert. den. 410 U.S. 990 (Mandatory ten year minimum); Gallego v. United States, supra (Mandatory 5 year minimum for first offense conviction of unlawful importation of marijuana); Halprin v. United States, 295 F. 2d 458 (9th Cir., 1961) (federal prohibition of parole together with variances in sentences which could be imposed under other narcotics laws); Hutcherson v. United States, 120 U.S. App. D.C. 274, 345 F. 2d 964, cert. den. 382 U.S. 894, 86 S. Ct. 188, 15 L. ed. 2d 151 (minimum mandatory sentence of 10 years for narcotics violations); Daut v. United States, 405 F. 2d 312 (9th Cir., 1968) (minimum mandatory sentence of 5 years for unlawful importation of marijuana), cert. den. 402 U.S. 945, 91 S. Ct. 1624, 29 L. ed. 2d 114; United States v. Drotar, 416 F. 2d 914 (5th Cir., 1969) (minimum mandatory sentence of 5 years upon second conviction for possession of marijuana and prohibition of probation or suspension of sentence), vacated on other grounds 402 U.S. 939, 91 S. Ct. 1628, 29 L. ed. 2d 107; United States v. Del Toro, 426 F. 2d 181 (5th Cir., 1970), cert. den. 400 U.S. 829, 91 S. Ct. 27 L. ed. 2d 60 (minimum mandatory sentence of 5 years for first offender convicted of selling heroin);

United States v. Lozaw, 427 F. 2d 911 (2d Cir., 1970) (minimum mandatory sentence of 5 years for knowingly concealing marijuana and conspiring to do so and prohibition of probation and suspension of sentence); United States v. Davila, 428 F. 2d 465 (9th Cir., 1970) (minimum mandatory sentence of 5 years for unlawful importation of marijuana); United States v. Avey, 428 F. 2d 1159 (9th Cir., 1970) (minimum mandatory sentence of 5 years for knowingly concealing marijuana with knowledge it had been unlawfully imported), cert. den. 400 U.S. 903, 91 S. Ct. 140, 27 L. ed. 2d 139; United States v. Sherman, (9th Cir., 1970) 430 F. 2d 1402 (minimum mandatory sentence of 5 year for illegal concealment and transportation of marijuana), cert. den. 401 U.S. 908, 91 S. Ct. 865, 27 L. ed. 2d 805, reh. den. 401 U.S. 1015, 91 S. Ct. 1249, 2d L. ed. 2d 522; Sperling v. Willingham, 353 F. 2d 6, 7 (7th Cir., 1965), cert. den. 384 U.S. 962 (1966); Stewart v. United States, 325 F. 2d 745, 746 (8th Cir.), cert. den. 377 U.S. 937 (1964) (also noting that imprisonment without parole is usual confinement), People v. Gonzales, 25 Ill. 2d 235, 184 N.E. 2d 833 (1962), cert. den. 372 U.S. 923 (mandatory 10 year minimum for first offender convicted of selling marijuana). People v. Jackson, 116 Ill. App. 2d 304, 253 N.E. 2d 527 (1969) (mandatory life sentence for second offender convicted of selling heroin). See also Bradley v. United States, 410 U.S. 605 (1973).

The Second Circuit in United States v. Chow, 398 F. 2d 596 (2d Cir., 1968) has held that the five-year statutory minimum sentence for drug conspiracy mandated by 21 U.S.C. 194 is not cruel and unusual punishment even when applied to a mother with no prior record, and whose 9 year old twins were dependent on her for support:

"Imprisonment, even long imprisonment has not been regarded as a cruel and unusual punishment. * * * Whatever may be thought as to the disability of mandatory minimum sentences they are far from 'unusual' in this country's penal law" (Citations omitted). 398 F. 2d 598.

Given "the epidemic dimensions of the problems" (People v. Broadie, supra at 117) a mandatory term of life imprisonment is not so grossly disproportionate to the gravity of the offenses as to amount to cruel and unusual punishment. As noted earlier (pp. 408) the scope of the drug problem in New York is immense.*

* The findings of a six-month investigation by the State Commission on Investigation were reported to be that there are 2,000 patient residents in 12 treatment centers for narcotics addicts in New York State at an average annual cost of \$26,900 per patient. N.Y. Times (January 4, 1976) § 1 p. 26.

The Legislature's judgment that a life sentence is a necessary deterrent is not so unreasonable that it should be invalidated by the Court. Lesser penalties have been tried, prior to September 1, 1973, and found wanting. In addition, narcotics-selling presents a difficult deterrence problem, warranting especially severe treatment, because persons willing to sell drugs are capable of earning sizeable sums of money with little effort and without the risks of physical harm that attend the commission of other money-making crimes, such as robbery and burglary. Deterring the non-addict seller, motivated by greed and faced with the attractive economic realities of the narcotics business, and deterring the addict-seller, who has the added motivation of satisfying his own drug habit may reasonably, in the Legislature's judgment, require a life-sentence.

The Court of Appeals in People v. Broadie, supra at 114-115, examined the penological purposes for the imposition of life sentences; isolation and deterrence:

"The reasons for isolating drug traffickers have already been suggested. The Legislature could find that narcotics sellers were the crucial link in the pernicious cycle of drug abuse; that sellers spawn addiction, and that addicts, in turn, may become sellers... The Legislature could conclude that the best way to break the chain would be to remove the seller from society for a long duration, and, upon his return, to continue surveillance through lifetime parole.

Deterrence is the other obvious purpose. It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible and therefore certain, exceptionally severe punishment...."

The District Court attempts to distinguish its decision from the State Court of Appeals by its review of the background of the individual appellees, when evaluating the sentences meted out to them.

There was however no claim by any of the appellees that the state sentencing judge did not have their probation reports available to him at the time of sentencing nor was there a denial of Fowlers brushes with the law over a number of years. (summarized in footnote).

In mitigation of her offense and in an effort to further justify its finding of disproportionality the court notes her interest in the welfare of her children, a significant portion of which involved events that occurred after she was incarcerated in Bedford Hills after her conviction.

Moreover, Judge Motley seems to frame the issue in terms of whether or not Ms. Carmona's sentence was fair in light of the fact that her sentence was for merely possessing 3 3/8 ounces of cocaine. The Court for some reason fails to take cognizance of

the fact that the appellee's plea to the possession count covered two other indictments in which she was accused of selling substantial quantities of heroin. Also, the Court fails to take cognizance of the fact that the Bronx District Attorney's office was of the opinion that Ms. Carmona was a member of a conspiratorial group which sought to distribute heroin and cocaine in the Bronx.

There was only a glossed over cursory review of Carmona's involvement with narcotics which, while acknowledging her convictions both in Federal and State courts, concluded that this was her first offense (p. 25 Ct opinion). The first offense occurred in the spring of the year which ended with her conviction in federal court in the fall of 1975.

In comparing sentences of other states for similar offenses such as California and Louisiana, the court concluded that Carmona and Fowler would have received substantially less onerous sentences under their respective jurisdictions.

That may be so only because in Louisiana the law makes a distinction between the sale of cocaine and heroin. If New York had done the same, the District Attorney in the case of Carmona might have insisted on a plea to one of the indictment involving the sale of heroin to cover the charges in the three indictments instead of one charging the sale of cocaine resulting in a life sentence.

The District Court correctly noted that at the time of the offenses in the instant case California had, as New York still has, a mandatory indeterminate life sentence for the sale of certain controlled substances.

While observing that the present federal law provides for a less severe penalty for a first conviction for a drug offense, it also takes cognizance that there are classifications such as "dangerous special drug offender" and engaging in a "continuing criminal enterprise" for which much more severe sentences could be meted out; classifications which are not extant under New York Law.

While commenting on the possibilities of parole and probation following convictions in other jurisdictions, as indicia of those with less severe punishments, the court takes the position (on p. 21) in evaluating the New York Drug law that it must base its judgment on the maximum term possible given these appellees while at the same time conceding that it is possible and even probable that they will both be released from prison substantially before the expiration of their maximum terms.

In the Second Circuit when the argument was made by a defendant convicted for selling heroin that a sentence of 20 years without parole was violative of the 8th Amendment as cruel

and unusual the court in its rejection found that such a sentence would be reduced by credit for time served and by good time credits earned. U.S. v. Fiore, 467 F. 2d 86 (2d Cir., 1972), cert. den. 410 U.S. 984. The court went on and stated in its reference to Furman (supra) that

" . . . while appellant would find some solace in the language of the opinions of Mr. Justice Brennan and Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the other opinions there supporting the majority holding, as well as the dissenting opinions, give no support to appellant's claim."

While reflecting in her opinion the thinness of the power to review the duration of sentence under the Eighth Amendment, while at the same time straining to justify it, Judge Motley in fact clearly transcended by any reasoning such limitation and it is plain that her disposition ^{is} an unwarranted interference with the State's sentencing in the case under consideration.

For the reasons stated above the decision of the District Court with respect to the appellees of Carmona and Fowler should be reversed.

CONCLUSION

THE SENTENCES PRESCRIBED FOR DRUG
CRIMES ARE IN ALL RESPECTS CON-
STITUTIONAL.

Dated: New York, New York
October 18, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

VALERIE PIRONE , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for
herein. On the 27th day of October , 1977 , she served
the annexed upon the following named person :

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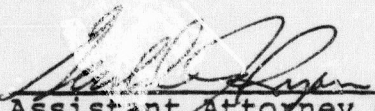
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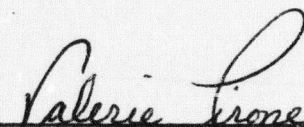
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Attorneys in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
addresses within the State designated by them for that
purpose.

Sworn to before me this
23th day of October , 1977


Assistant Attorney General
of the State of New York


VALERIE PIRONE